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IN THE

Supreme Court of the United States

OCTOBER TERM 1940

No. 800801

JACK SCHNEIDER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF GENERAL SESSIONS OF THE COUNTY OF NEW YORK, AND BRIEF IN SUPPORT THEREOF

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INDEX

	PAGE
PETITION	1
A—Statement of the Matter Involved	2
B—Question Presented	6
C—Reasons Relied On for the Allowance of the Writ	6
1. Petitioner stands convicted of a crime for which he was not tried	7
2. The jury disbelieved the prosecution's sole witness, and convicted Petitioner solely because of his alleged radicalism	8
3. Petitioner as well as his chief witness were tried and convicted of radicalism	8
4. The character of the trial and its relation to the charge of the Court to the jury	9
BRIEF IN SUPPORT OF PETITION	15
I—The matter involved is of outstanding public interest	15
II—The contention that petitioner's constitutional rights have been invaded is based on the entire record and not exclusively on any particular portion	18
III—The objectionable features of the trial were duly excepted to, and the constitutional question duly raised in the state courts	22
CONCLUSION	25

TABLE OF CASES AND STATUTE CITED

Cooke v. United States, 267 U. S. 517	22
Pennoyer v. Neff, 95 U. S. 714	22
Powell v. Alabama, 287 U. S. 45	22
United States Constitution, Fourteenth Amendment	13, 22

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Jack Schneider, respectfully prays that a *writ of certiorari* issue to review the judgment of the Court of General Sessions of the County of New York, convicting him of the crime of coercion, upon which said judgment he was sentenced by a judge of the said Court, on July 7, 1939, to the New York County Penitentiary for an indeterminate term, and which said judgment has since been affirmed by the Appellate Division of the Supreme Court of the State of New York, in and for the First Department, and by the Court of Appeals of the State of New York, which said last named court is the court of last resort of the said State.

And in support of his said petition, your Petitioner respectfully shows to this Honorable Court as follows:

A

Statement of the Matter Involved

Your Petitioner is a Jew, an alien, a member of the American Labor Party, a political party duly organized and existing under the laws of the State of New York, and an official of Furriers' Joint Council, an unincorporated association, being a representative body consisting of local labor unions in the fur industry, which said Furriers' Joint Council as well as the locals of which it is composed were at the times hereinafter mentioned affiliated with International Fur Workers Union, and said last mentioned organization was at the times hereinafter mentioned affilated with Congress of Industrial Organizations, commonly known and hereafter referred to as C. I. O.

On or about May 24, 1938, your Petitioner and six other persons were indicted by the Grand Jury of the County of New York, State of New York, for the alleged crimes of assault, coercion, and conspiracy to commit assault and coercion. Your Petitioner and five of the other defendants were thereafter brought to trial in the Court of General Sessions of the County of New York on May 16, 1939, and the following days until the 16th day of June, 1939, on which last mentioned day the jury which had been impaneled to try the said case returned a verdict acquitting four of your Petitioner's co-defendants of all the crimes charged in the indictment, disagreeing as to the fifth one, and *acquitting your Petitioner of the crime of assault and conspiracy to commit assault and coercion, but convicting him of the crime of coercion.* Thereupon and on July 7, 1939, your Petitioner was sentenced by a judge of the said Court to the New York Penitentiary for an indeterminate term.

Thereupon your Petitioner appealed to the Appellate Division of the Supreme Court of the State of New York, in and for the First Department, which court affirmed the said conviction. Thereupon your Petitioner appealed to the Court of Appeals of the State of New York, by permission of the Chief Judge of the said Court, and the said appeal resulted in an affirmance of the said conviction by a divided Court, five Judges voting for the affirmance of the said conviction while the Chief Judge and one Associate Judge dissented from such decision and voted for a reversal of the conviction. The decision by the Court of Appeals affirming said conviction was made on December 31, 1940. The record in the case was thereupon returned by the Court of Appeals to the Court of General Sessions.

Thereafter, a motion was made by your Petitioner in the said Court of Appeals for an amendment of the remittitur of the said Court to the Court of General Sessions, which said motion was granted and the said remittitur amended. The amended remittitur was filed in the Court of General Sessions of the County of New York on January 31, 1941.

A duly certified copy of the said indictment and of all the proceedings had thereon in the said courts is made part hereof and will be filed in this Honorable Court together with this petition.

As appears from the said record the prosecution herein was the outgrowth of a general strike conducted by Furriers' Joint Council (hereinafter referred to as the Union) in the City of New York, commencing on or about April 1, 1938, which said strike was itself the outgrowth of a lockout ordered by an association of employers in the fur industry of the City of New York, which said lockout was in effect for some time prior to the declaration of the strike by said Furriers' Joint Council.

It was claimed by the prosecution that one Jacob Friedlander, a member of the Union and the father-in-law of one of the employers involved in the said strike and lockout,

had been assaulted at the Union headquarters on the afternoon of April 8, 1938, by three of Petitioner's co-defendants (Liberi, Rau, and Gru) by order of Petitioner and one of his co-defendants (Mencher) in an effort to extract from Friedlander information about his employer; and that the assault was committed in pursuance to a previous conspiracy entered into by all of the defendants, in pursuance to which conspiracy Friedlander had been convoyed to Union headquarters by the order of the sixth defendant tried with Petitioner (Lauber). All of the persons named, except Liberi, were officials of more or less importance in the Union, and Liberi, although an ordinary member, was active in the strike. Petitioner was represented by the prosecution to have been the principal strike leader. Mencher (as to whom the jury disagreed) was represented as being next in importance in the conduct of the said strike.

It was undisputed that two days earlier, to wit, April 6, 1938, Friedlander had been followed by Liberi in order to ascertain his movements. The reason therefor was disputed: The prosecution claimed that Friedlander was followed in order to see whether his movements led to the place where it was suspected his employer was carrying on business during the strike; while the defense claimed that he was followed in order to check up on his claim that he could not do any picketing because of an ailment, and also to ascertain whether his claim to sick benefit, based on the said ailment, was justified. There was no claim that Petitioner did anything except order the alleged assault by his co-defendants, who were acquitted, and the prosecutor told the jury expressly that the Petitioner's guilt was based upon his responsibility for the acts of his said co-defendants in committing the alleged assault. There was no evidence in any way connecting Petitioner with the occurrences of April 6, 1938, but the prosecutor told the jury that they may *infer* that it was done by his direction because of his position as strike leader (Record, fols. 3746-3748).

While counsel for the defense was making his opening address to the jury, and was about to tell the jury what he intended to prove by way of factual situation bearing on the alleged coercion, he was stopped by the Court with the statement:

> "The Court: That would not be relevant in this case. *Confine yourself to the counts of conspiracy and assault*" (Record, fol. 121. Italics supplied throughout unless otherwise stated).

Thereafter, no reference of any kind whatsoever was had during the entire trial to the charge of coercion. And this charge was not again referred to until after the testimony was all in and defense counsel had concluded his summing up to the jury.

It was first mentioned again, rather perfunctorily, by the State's attorney in his summation to the jury; and then by the Court in its charge to the jury.

The long trial, while nominally a trial for assault and conspiracy, resolved itself into a trial of Petitioner for his political and economic views and affiliations. This was enhanced by the attack of the prosecutor on Petitioner's chief witness for allegedly holding similar views; and culminated in the Court instructing the jury that they may take into consideration the holding of such views in determining the credibility of witnesses. Petitioner had taken the witness stand and testified in his own defense.

The Appellate Division wrote no opinion. Neither did the Court of Appeals, except the following memorandum:

> "Judgment affirmed. No opinion. All concur except Lehman, Ch. J., and Loughran, J., dissent on ground that *there were errors committed at the trial which in their opinion were clearly prejudicial.*"

The amended remittitur of the Court of Appeals concludes as follows:

> "Judgment affirmed, this Court having overruled the contention of the appellant that his trial and conviction

were in violation of the due process clause and the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States, and having refused to pass upon the effect of any parts of the charge to which no exceptions were taken."

B

Question Presented.

The sole question presented is:

Was the conviction of Petitioner in accordance with due process of law and the equal protection of the laws as required by the Fourteenth Article of Amendment to the United States Constitution, or was the said conviction in violation of the due process of law and the equal protection of the laws clauses of the said Amendment?

C

Reasons Relied On for the Allowance of the Writ.

The question presented is one of constitutional interpretation, namely, whether under our constitutional system, guaranteeing life, liberty, and property, against invasion except by due process of law, and the application of the laws alike to all persons, irrespective of race, nationality, religious, political, or social creed or belief, a person or group charged with crime may be treated differently because he, or they, or their witnesses, belong to a particular race or nationality, or because they hold certain political, social, or religious views, or belong to an organization whose members hold certain political or social views. It is the contention of Petitioner that the record shows that his trial and conviction were not in accordance with due process of law, but contrary to constitutional

guarantees with respect thereto and to the equal protection of the laws clause of the Fourteenth Article of Amendment to the United States Constitution. Petitioner contends that had the laws of the State of New York been applied to him on a basis of equality with all other persons charged with crime he would have been acquitted of the crime of which he now stands convicted; and that his conviction was due entirely to the fact that the laws had not been applied to him on a basis of equality with other persons charged with crime. Petitioner further shows that the protection of the Constitution of the United States had been invoked in the state courts in due time; and that the said protection had been denied him by the state courts.

The said contentions are based upon the following facts which appear in the record:

1. *Petitioner stands convicted of a crime for which he was not tried.*

Petitioner was actually tried for the crimes of assault, and conspiracy to commit assault and coercion by means of assault. He was acquitted of both, as were his co-defendants who were supposed to have conspired with him to commit the assault and coercion, and who were supposed to have actually committed the assault upon which the coercion charge depended. As already pointed out he was never tried on the charge of coercion, which had been ruled out by the Court at the commencement of the trial. This peculiar result, Petitioner claims, was due to the manner in which the case was tried, whereby he was singled out for attack by reason of the fact that he was a Jew, an alien, and particularly for his alleged radical political and social views and connections, coupled with the charge by the Court in submitting the case to the jury which permitted the jury to convict him of an offense for which he was not tried by the application of standards of credibility which are contrary to constitutional guarantees.

2. *The jury disbelieved the prosecution's sole witness, and convicted Petitioner solely because of his alleged radicalism.*

Petitioner claims that the record conclusively demonstrates the fact that the jury disbelieved the prosecution's sole witness as to the alleged assault,—the complaining witness Friedlander,—and convicted Petitioner solely because of his radical views, under a charge of the Court which permitted them to convict him of coercion on the basis of the occurrences of April 6, *which were not the basis of the indictment for coercion,* after a trial in which the jury were led to believe by the Court and prosecutor that Petitioner's alleged radical views were part of the crime charged against him in the indictment, and under a charge by the Court in which they were expressly told that in weighing the testimony of any witness, they may take into consideration his *religious, political and social* views. This charge was in the following language:

> "Under our law a man has a right *to belong to any party or church that he may select, or any union.* It is not so much a question of what party or what church he belongs to as it is a question of the manner of man he is. *Does he respect the law* of his land? Does he respect the law of this State, as I have given it to you. That is the law of assault, the law of conspiracy and the law of coercion, and I certainly think you ladies and gentlemen in your deliberations will not inquire in this case and *on the evidence you have heard, as to the political, social or religious affiliations of a man* in connection with this case, *except insofar as these inquiries may help you to determine where the truth lies*" (fols. 3866-3867).

3. *Petitioner as well as his chief witness were tried and convicted of radicalism.*

Petitioner in his defense relied on an alibi: He claimed that at the time when the complaining witness, Friedlander, claimed to have had a talk with him at the Union head-

quarters, at which time Petitioner is supposed to have given the order to his acquitted co-defendants to coerce Friedlander into giving certain information by beating him up, he, Petitioner, was seated on the platform at a mass meeting conducted by the Union in a public hall in connection with the strike. His principal alibi witness was Michael Quill, president of the Transport Workers Union, who was one of the speakers at that meeting. This witness was subjected to a severe attack for alleged radicalism, and his presence on the witness stand actually turned into a trial of this witness for his alleged radical social and political views, particularly in connection with labor disputes. Petitioner's own presence on the witness stand, as disclosed by the record, was not an inquiry relating to the commission of the crimes charged, or into any facts bearing on that question, but into the alleged radicalism of his social and political views, particularly as related to labor disputes.

4. *The character of the trial and its relation to the charge of the Court to the jury.*

Petitioner's principal alibi witness, Michael Quill, preceded him on the witness stand. He testified briefly about attending the mass meeting in question, and as to the time it was held; and that he saw Petitioner on the platform when he arrived and when he left. He was then cross-examined at some length about his acquaintance with Petitioner, and the unions to which they, respectively, belonged; developing the fact that both these unions belonged to the C. I. O. Thereupon the cross-examination proceeded as follows:

> "Q. How long have you been engaged in Union activities of one sort or another? A. Well, I was in the Irish Transport and General Workers' Union back in 1923.
>
> Q. I didn't get the name of that union. A. The Irish Transport and General Workers' Union.

Q. Was that here or somewhere else? A. That was in Ireland.

Q. And in 1923? A. Yes.

Q. And were you active and prominent in union affairs *there at that time?* A. Not prominent—just a member of the union.

Q. *Did they have a strike?*

Mr. Samuel Markewich: I object as to whether there was a strike in Ireland.

The Court: *It is cross-examination.*

Objection overruled" (fols. 814-815).

* * * * * * *

"Q. I think you said a bit back in your testimony, that over in Ireland they had a more peaceful way of settling labor disputes and strikes, is that right? A. Yes, that is correct.

Q. *Well, would I be correct in saying that you do not advocate the use of force and violence in strikes?*

Mr. Arthur Markewich: Objected to.

The Court: Objection overruled" (fols. 828-829).

Thereafter the cross-examination continued for many pages, all designed to show, or to insinuate, that the witness believed in the use of violence in labor disputes.

While other witnesses for Petitioner were on the witness stand, the State's attorney was permitted to cross-examine them on matters which had no relevancy whatever to the case, except to create a general atmosphere of prejudice against Petitioner and the Union of which he was, or was alleged to be, the leader, thus creating an atmosphere which made a fair trial according to law impossible. This reached its climax when Petitioner took the witness stand, and particularly during his cross-examination. The opening of the cross-examination was as follows:

"*Cross-examination by Mr. Hale.*

Q. Mr. Schneider, where were you born? A. In Roumania.

Q. What part of Roumania? A. Bessarabia.

Q. That is the same place that Izzy Gru was born, is it not? A. The same country.

By the Court.

Q. *What was your true name in Bessarabia?* A. Jack Schneider—Schneider.

Q. *What was Izzy Gru's true name in Bessarabia?* A. I didn't know him on the other side" (fols. 2463-2464).

These marks of hostility on the part of the presiding judge, and insinuations of other crimes, both by the State's attorney and by the presiding judge, continued throughout a long cross-examination, and included the insinuation that Petitioner was illegally in this country, and was an undesirable alien.

There was also the continuous attack upon Petitioner for his alleged views on social questions, which commenced with an argument between the Court and Petitioner while Petitioner was testifying on direct. As stated before, it was the theory of the prosecution that the assault upon Friedlander was in an endeavor to discover whether or not "scabbing" was going on during the strike. It was the contention of the defense that "scabbing" was not a problem during the strike because the strike had been preceded by a lockout on the part of the employers, the industry having suffered from overproduction, and the employers did not therefore engage in any production during the strike. In this connection Petitioner was asked by his counsel the question:

"Q. And isn't it a fact that the great problem confronting the industry at that time was that there was overproduction of finished stock, and that the employers themselves were trying to devise means of stopping production at that time?"

To this the appellant replied:

"This was the general opinion in the trade."

At which point the Court broke in with the following:

"By the Court.

Q. *Wouldn't that be a good reason for a lockout—overproduction?* A. Why should the workers suffer by it?

Q. *Why should the boss produce if he could not sell his goods?"* (fols. 2442-2443).

Petitioner believes and asserts that the Court, by its conduct and rulings, made a fair trial impossible; that the jury were thereby led to believe that Petitioner was not on trial for anything that he actually did but for the things he believed in or "stood for", and the manner in which he conducted the labor union of which he was an official, and particularly the strike in which that Union was involved. The jury were thereby further led to believe that even if they disbelieved the testimony of the prosecuting witness, and therefore were bound to acquit Petitioner of the charges of assault and conspiracy, they might nevertheless convict him of coercion, although there was no evidence thereof and he had not been tried therefor, as they would thereby be doing their duty as good citizens in ridding this country of an undesirable radical alien. Also, that under the rules of law which they understood the Court to lay down with respect to the manner in which the radical views of a witness affected his credibility, the jury believed that they had a right to disregard Petitioner's assertions and that of his chief witness and bring in a verdict of guilty based solely on their own speculation,—which the prosecutor with the acquiescence of the Court,—told them they might indulge in as to what a man like Petitioner might do in the situation presented by the strike.

Your Petitioner verily believes that this application presents a case cognizable under the rule of this Honorable Court, and one eminently proper for review by this Honorable Court, not only because of the injustice done to him, but because it affects a large number of persons similarly

situated, and is therefore of great public interest, particularly in these times when persons situated like himself are in grave danger of being deprived of their liberty without due process of law, unless this Honorable Court intervene under the power granted to it by the Fourteenth Article of Amendment to the United States Constitution.

WHEREFORE, your Petitioner respectfully prays that a *writ of certiorari* be issued out of and under the seal of this Honorable Court, directed to the Court of General Sessions of the County of New York, in the State of New York, commanding that Court to certify and to send to this Honorable Court a full and complete transcript of the record of all proceedings in the within cause, and to stand to and abide by such order and direction as to your Honorable Court shall seem meet and the circumstances of the case require, and that your Petitioner may have such other and further relief or remedy in the premises as to this Honorable Court may seem just and proper.

Dated, New York, February 20, 1941.

LOUIS B. BOUDIN,
Of Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM 1940

No.....

JACK SCHNEIDER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

POINT I

The matter involved is of outstanding public interest.

We respectfully submit that this is not the ordinary case of an individual convicted of crime, which usually involves merely the question whether justice had been done to an individual in a particular case. There is no claim here that either the judge presiding at petitioner's trial or the jury which passed upon his guilt were animated by a feeling of hostility towards petitioner personally. Nor does this case involve an ordinary labor dispute, in the sense that petitioner is merely the victim of class prejudice either on the part of the judge or the jury because of the fact that he was on the wrong side of a labor dispute from their point of view. *That* is, indeed,

involved in this case; and petitioner does claim that the fact that the case grew out of a labor dispute, or that a labor dispute was involved therein, was the basis of his conviction. But petitioner claims further that his conviction is due to the fact that the labor dispute in which he was involved was complicated by special circumstances and that *the state court therefore applied a special kind of law to him,* which deprived him of both due process of law and the equal protection of the laws guaranteed by the United States Constitution.

But while petitioner was the victim of a special kind of labor dispute, his case is not an *isolated* one. On the contrary, it is becoming more and more prevalent, and the petition to this Court for a writ of certiorari is based on the belief that, unless this Court steps in by enforcing the paramount provisions of the Federal Constitution, the kind of justice meted out to this petitioner and the kind of law applied in his case may become prevalent in our state courts, and possibly in our courts generally. It is petitioner's claim that he is the victim of a movement to apply a different kind of law to *radical* labor leaders than to ordinary labor leaders, complicated by a movement against so-called undesirable aliens,—the *radical* alien labor leader being the *undesirable alien par excellence.* This movement has, unfortunately, become widespread and has had various manifestations. One of these manifestations was the persistent effort to deport Harry Bridges, the well known Pacific Coast C. I. O. leader, which culminated in an attempt to pass a special Act of Congress to deport him, when it was found that he could not be deported under existing law. Another manifestation of this movement is the present case,—except that, unfortunately, the enforcement of the ordinary legal processes was in different hands from those which handled the Bridges case. It is this that gives the matter its public importance: Petitioner claims that a special kind of law was deliberately applied to him in the court in which he was tried, not only for the purpose of convicting him of

crimes of which he was clearly not guilty, but primarily for the purpose of finding a means of deporting him as an allegedly undesirable alien.

And we respectfully submit that an examination of the record of the trial will conclusively prove this claim to be true. This is shown by the first two questions put by the trial judge to petitioner as recited in the foregoing petition. But those two questions are merely illustrative of what went on throughout the trial, and particularly throughout the cross-examination of petitioner and his chief alibi witness, Michael Quill. This is also shown by the lengthy cross-examination as to the manner in which petitioner came to this country, followed by the charge that petitioner was illegally in this country,—*a charge which both the Court and prosecutor knew to be unfounded* (fols. 2479-2493). And it is shown again by the summation of the prosecuting attorney, in which he specifically told the jury that the *Alien Squad* of the New York Police Department had particular reason for watching the petitioner (fol. 2802). But these are not the only places in which that was shown. If this Court takes jurisdiction, we expect to show by other portions of the record that this was the basic reason for the state court's application of a different rule of law to petitioner from that which the same court applied to other persons charged with crime under the laws of the State of New York.

Unless, therefore, this Court steps in and tells the state courts that the alien within our gates is entitled to the equal protection of the laws, and that a radical labor leader is entitled to be tried under the same laws and with the application of the same legal principles as any other person, and that even a combination of the two, that of being both an alien and a radical labor leader, does not deprive a man of his constitutional rights, there is grave danger that we may have two classes of law,—*two standards for measuring the guilt of persons charged with crime*,—one applicable to ordinary citizens, and another applicable to alleged undesirable aliens.

POINT II

The contention that petitioner's constitutional rights have been invaded is based on the entire record and not exclusively on any particular portion.

We desire to make it clear that our contention of lack of due process is based on the entire record. While certain aspects of the case would be sufficient to warrant a review by this Court even if they stood alone, because of the invasion of constitutional guarantees which each discloses, petitioner's application is based on the record as a whole,—the cumulative effect of the various aspects of the case which resulted in a complete deprivation of due process and of the equal protection of the laws. Because of this, it is only possible in this preliminary brief to indicate the points involved, so as to show the nature of the points involved and the kind of argument we seek to present if leave to appeal is granted,—leaving the argument itself to abide that event.

The nature of the points involved can best be stated by pointing to those points made by us in the state courts which we believe raise federal questions. The first of these points, raised both in the Appellate Division and the Court of Appeals, is *that petitioner was convicted of a crime for which he was not tried and with which he was not charged.* That, we respectfully submit, clearly raises a federal question,—the question of due process under the Fourteenth Amendment. Whether or not our contention is correct is, of course, a question which can only be determined after a reading of the full record. There are, really, two questions here: one, as to whether petitioner was *tried* for coercion; and the other, whether the *coercion* of which he was convicted is the same as that with which he was charged in the indictment.

The first is a comparatively simple question, and the new facts which it involves are stated in the petition.

But their *verification* requires a reading of the entire record. The second question is a more complicated one, and requires a rather elaborate argument as to the *meaning* of the facts disclosed by the record,—and the soundness of which can only be tested by a reading of the entire record.

The real question in a case like the present one is whether the actual trial,—i. e., what took place before the jury between the reading of the indictment and the rendition of the verdict,—amounted to a trial of the charge mentioned in the indictment, and whether that trial was conducted in accordance with the requirements of due process. The second basic question therefore relates to the *conduct* of the trial; and that, of course, can only be determined by a reading of the entire record.

Summarizing our argument in the state court, in so far as it related to the constitutional questions we seek to argue in this Court, it may be stated as follows:

(a) That petitioner was convicted of a crime for which he was not tried.

(b) That the coercion of which he was nominally convicted is not the coercion charged in the indictment.

(c) That he was really tried and convicted of *something* which was not mentioned in the indictment and which was not a crime under the laws of the State of New York,—namely, that of being a radical labor leader and therefore an undesirable alien.

(d) That because of the nature of the "offense" for which he was actually tried, the trial was conducted under what may be called a "suspension of the rules"; that is, a suspension of the constitutional safeguards which apply to the conduct of criminal cases, so as to permit the jury to find petitioner guilty of some crime in order that punishment might be inflicted,—and particularly with the view to obtaining "a punishment that would fit the crime" of

being an undesirable alien, namely, his deportation from this country.

(e) That the suspension of the rules which prevailed throughout the trial continued in the Court's charge to the jury, in which the jury were instructed that in passing upon the credibility of any witness they may take into consideration the *religious, social and political views* and affiliations of the witness.

A few words of amplification should be said in connection with the point referred to under (b). As already stated, it is our contention that the charge of coercion of which petitioner was found guilty *was not the same coercion* as that with which he was charged in the indictment. The record shows that the charge of coercion was based on the assault with which he was charged in the same indictment. The prosecutor expressly so stated to the jury in his opening (73-75). *But the jury acquitted him of the assault, and therefore of the coercion based on that alleged assault.*

But in its charge to the jury, after the case was closed, the Court injected *a new charge*, not stated in the indictment nor tried,—namely, a charge of coercion based on the occurrences of April 6 (fol. 3847). It is our contention that the injection, *after the trial*, of a new *factual basis* for the charge of coercion made in the indictment was a clear violation of due process. But this new and different charge of coercion also lacked any actual basis of fact in the evidence. And it is our contention that *an utter lack of evidence* raises a question of law, and when the law amounts to a constitutional guarantee it raises a question reviewable by this Court.

A few words should also be said in amplification of our contention under (a). It is our contention that whichever claim is made on behalf of the State of New York as to the basis of petitioner's conviction, there was a lack of due process because of the fact that the Court did not

permit counsel for petitioner to open to the jury with respect to the charge of coercion. This, too, has a double aspect: It is our contention that the refusal to permit counsel for petitioner to open to the jury on the count charging coercion is in itself a denial of due process. In addition to that, the form in which the Court put its ruling, and the subsequent course of the trial while the prosecution was putting in its case, of necessity led counsel for petitioner to assume that the charge of coercion would not be pressed, and they were thereby prevented from putting in any evidence that they might have put in had the Court not misled them into believing that the charge of coercion was out of the case. Under those circumstances it was clearly a deprivation of due process to pick up the charge of coercion again after the case had been closed, and to permit the jury to find a verdict of guilty on the basis of either the occurrences of April 8 or April 6. This was particularly improper as to the occurrences of April 6,—quite aside from the question that it was not the charge made in the indictment,—since at no time during the course of the trial was it suggested that the evidence was being introduced in proof of the charge of coercion, and was adduced as evidence of the alleged conspiracy,— *the charge of coercion itself being expressly based by the prosecution on the alleged assault.* In view of the rulings of the Court and the express statements of the prosecuting attorney to the jury, *both in the opening and closing*, that the charge of coercion is based upon the charge of assault, counsel for the defense had a right to expect that if they disproved the assault that would disprove the coercion. Under the circumstances a conviction for coercion based on something different than the assault which was expressly laid as the basis of the charge of coercion is in effect to base the conviction on a charge that had *neither been made nor tried.*

We take it that there is no necessity to argue the point that if our contention be true that the record shows that petitioner was convicted of a crime with which he was not charged, or of a crime with which he was charged but

for which he was not tried, the resultant contention of lack of due process within the protection of the Fourteenth Amendment to the United States Constitution is well founded. We shall, therefore, not discuss the point any further. It may be argued, however, that the question of the refusal to permit petitioner's counsel to open to the jury on the coercion count was not within the protection of the United States Constitution. In anticipation of such argument we shall cite the following cases decided by this Court, which, we respectfully submit, clearly establish that due process of law under the United States Constitution includes representation by counsel, and not merely formal representation but *the right to argue both to the Court and the jury in accordance with the principles of the common law.*

Pennoyer v. *Neff*, 95 U. S. 714.
Cooke v. *United States*, 267 U. S. 517.
Powell v. *Alabama*, 287 U. S. 45.

POINT III

The objectionable features of the trial were duly excepted to, and the constitutional question duly raised in the state courts.

It remains to discuss briefly the question whether or not the questions sought to be reviewed were raised in the state courts in a manner to entitle the petitioner to the intervention of this Court. In this connection we respectfully submit that the applicable rule, as gathered from the decisions of this Court, does not require that petitioner, in order to be entitled to a review by this Court of the question whether or not his trial was in accordance with due process, must have specifically invoked the protection of the United States Constitution *in haec verba*. All that the rule requires is that the *question* sought to be considered by this Court should have been *raised* in the state

court. Not that that would make much difference in the present case,—for, concededly, the protection of the Federal Constitution was invoked in the state court, in so many words, with respect to the due process clause as well as to the equal protection of the laws clause of the Fourteenth Amendment. The amended remittitur contains a specific certification of that fact. It says:

> "this Court having overruled the contention of the appellant that his trial and conviction were in violation of the due process clause and the equal protection of the law clauses of the Fourteenth Amendment to the Constitution of the United States."

There can therefore be no question but that the protection of the United States Constitution was duly invoked by petitioner and denied by the state court. The question may, however, possibly become material on the question as to whether or not all of the questions sought to be raised by us may be reviewed by this Court, and particularly whether the question of the Court's charge to the jury in the paragraph quoted in the petition may be reviewed by this Court, in view of the statement in the amended remittitur, following the language quoted above:

> "and having refused to pass upon the effect of any parts of the charge to which no exceptions were taken."

In this connection, we respectfully submit, in the first place, that that is a question that should be argued on the appeal itself and not on the application for permission to appeal by writ of certiorari. In the second place, we respectfully submit, that the question whether certain state procedural requirements will stand in the way of a review by this Court of a judgment attacked for lack of due process is itself a Federal question. And that question, we respectfully submit, should also be argued on the main appeal and not on this application. We desire to point out here, however, by way of preliminary argument, that the paragraph of the Court's charge quoted in the petition herein, which the Court of Appeals apparently had in mind

when it put into the amended remittitur the language last quoted therefrom, received its meaning from the course of the trial which had preceded the charge itself. *That procedure had been objected to, and duly excepted to, at every stage;* and the questions raised by the separate exceptions were presented again by the motion to dismiss at the end of the State's case as well as at the end of the entire case, and by the exceptions taken to the denial of those motions.

In this connection we respectfully call the attention of the Court to the fact that the dissenting judges of the New York Court of Appeals did not base their dissent on any *particular error,* but on the *cumulative effect of the errors committed during the trial as shown in the record.*

What Chief Judge Lehman and Associate Judge Loughran said in their very terse statement of reasons, really amounted to a statement that *petitioner did not have a fair trial,*—which, in turn, is merely another way of saying that the conviction was *in violation of due process of law.*

In this connection we respectfully call the attention of the Court to the fact that the Court of Appeals of the State of New York may not, under the provisions of the New York State Constitution, review any questions of fact, and is limited to the consideration of questions of law only. What the two dissenting judges, therefore, said, in effect, is that, leaving out the questions of weight of evidence, and examining the record purely from the point of view of due process of law,—that is to say, the application to this case of well settled rules of legal procedure applicable in criminal cases generally,—they had come to the conclusion that the trial is a whole did not meet the requirements of due process which are part of our general jurisprudence, and are therefore embodied in both the New York State and the Federal Constitutions. And this, again, is equivalent to saying that petitioner did not receive the equal protection of the laws which is guaranteed him by the equal protection of the laws clause of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

This case is clearly one in which the public interest requires a full review by this Court. A *writ of certiorari* should, therefore, be granted, so as to bring this case before this Court for a full argument of the questions involved, so that this Court may pass upon the very serious and grave questions involved, and render judgment accordingly.

Dated, New York, February 20, 1941.

Respectfully submitted,

Louis B. Boudin,
Of Counsel for the Petitioner,
20 West 43rd Street,
New York City.

MAR 21 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1940

No. 801

JACK SCHNEIDER

Petitioner

v.

THE PEOPLE OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS E. DEWEY
District Attorney
New York County

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INDEX

PAGE

STATEMENT 1

INTRODUCTION 2

STATUTE INVOLVED 2

QUESTIONS PRESENTED 2

I.—The petitioner was tried for, and convicted of, the crime of coercion alleged in the indictment 3

A. There was no dismissal of the count charging coercion 4

B. The petitioner's guilt of coercion did not depend upon the commission of an assault either by himself or by his codefendants 6

C. The petitioner's conviction was based upon the acts charged in the indictment 7

II.—The trial was fair; petitioner's constitutional rights were not invaded 8

A. There was no attack upon the petitioner's religious, social, or political views 8

1. The court's charge to which no objection was taken was proper 9

B. The defense witness Quill was not "tried and convicted of radicalism" 10

III.—No federal question is presented to this Court 11

IV.—The petition for a writ of certiorari should be denied 15

Table of Cases Cited

PAGE

Capital City Dairy Co. v. Ohio (1901) 183 U. S. 238 13
Chicago, &c. Ry. Co. v. McGuire (1904) 196 U. S. 128 13

Dunn v. U. S. (1931) 284 U. S. 390 7

Herndon v. Georgia (1934) 295 U. S. 441 13

Lynch v. New York (1934) 293 U. S. 52 13

Mutual Life Ins. Co. v. McGrew (1903) 188 U. S. 291 13

People v. Berman (1934) 264 N. Y. 693, aff'g (1st Dept. 1934) 241 App. Div. 844 ..... 4, 6
People v. Cohen (1918) 223 N. Y. 406, cert. den. 248 U. S. 571 7
People v. Eichner (1st Dept. 1915) 168 App. Div. 200 7
People v. Haupt (1928) 247 N. Y. 369 7
People v. Irving (1884) 95 N. Y. 541 10
People v. Johnston (1920) 228 N. Y. 332 10
People v. Malkin (1928) 250 N. Y. 185 10
People v. Mullen (1900) 163 N. Y. 312 10
People v. Sherlock (1901) 166 N. Y. 180 12
People v. Sieke (1918) 222 N. Y. 611 12
People v. Wolf (1906) 183 N. Y. 464 4

Sasser v. U. S. (C. C. A. 5th Cir. 1928) 29 Fed. (2d) 76 cert. den. sub nom. Russell v. U. S., 279 U. S. 836 7

Whitney v. California (1926) 274 U. S. 357 14

Supreme Court of the United States

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JACK SCHNEIDER,
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v.
THE PEOPLE OF THE STATE OF NEW YORK.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

The petitioner seeks the review of a judgment of the Court of General Sessions, New York County, convicting him of the crime of COERCION (Penal Law, § 530). He was sentenced to imprisonment for an indeterminate term in the Penitentiary of the City of New York (3950).* This judgment was affirmed by the Appellate Division of the Supreme Court of the State of New York, First Department (4048-50), and by the Court of Appeals of New York State.

The petitioner's application for a stay of execution pending decision on this petition was denied by Mr. Justice STONE on March 3, 1941, with the statement *"that the case is not an appropriate one for a stay."*

* References are to folios of the printed record.

Introduction

The petitioner and five others were indicted by a grand jury drawn for the Court of General Sessions of the County of New York, State of New York, and were charged with the crimes of coercion (Penal Law, § 530), of assault in the second degree (Penal Law, § 242) and of conspiracy (Penal Law, § 580). The crime of assault in the second degree is a felony; those of coercion and of conspiracy misdemeanors. After a trial lasting for five weeks, the jury acquitted four of the defendants, reported a disagreement as to a fifth, and convicted the petitioner of the crime of coercion.

Statute Involved

Section 530 of the Penal Law, which defines the crime of coercion, reads as follows:

> "A person who with a view to compel another person to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing, wrongfully and unlawfully,
>
> 1. Uses violence or inflicts injury upon such other person or his family, or a member thereof, or upon his property or threatens such violence or injury; or,
>
> * * *
>
> 3. Uses or attempts the intimidation of such person by threats or force,
>
> Is guilty of a misdemeanor."

Questions Presented

The petitioner urges that he was denied due process and the equal protection of the laws (1) because he was convicted of a crime which was not alleged in the indictment and for which he was not tried, and (2) because the court suspended the constitutional safeguards applicable to criminal trials and permitted the jury to convict the petitioner solely because of his radical and religious views and affiliations.

I

The petitioner was tried for, and convicted of, the crime of coercion alleged in the indictment.

Since the petitioner's guilt was established clearly and beyond a reasonable doubt, no purpose would be served by reviewing the evidence in detail. Briefly, however, the proof showed that, on April 8, 1938, in the course of a strike called by the Fur Workers Union in New York City, one Jacob Friedlander, a somewhat apathetic union member, aged 62 years and employed by one of the fur manufacturing firms affected, was brought down to the union headquarters (222-33). There, the petitioner, the business agent of the union, ordered Friedlander to reveal certain information, such as the number of employees and the number of machines being used by his employer and the address of the foreman of the shop (223-34).[1]

When Friedlander told the petitioner that he could not impart the information demanded, Schneider told him (234-5):

> "this is the last chance I am going to give you. You are an old man and you cannot take it any more."

When Friedlander declined to take advantage of this "last chance," the petitioner summoned others and directed them to "make him [Friedlander] talk" (236). In a similar effort to obtain the desired data, these latter brutally beat and kicked the aged Friedlander (236-7, 245-52). The injuries which he received—including a cerebral concussion, and lacerations and contusions about the face

---

[1] In passing, we note that the presence of Friedlander and the petitioner Schneider together at the union headquarters at this time was vouched for by another witness, Albert Fitz, who testified that he had been questioned by Schneider on the same day about the same foreman (3367).

(679-80, 751)—were of such gravity that he was considered to be in danger of dying and was confined to a hospital for over three weeks (236-7, 245-52, 700-28, 751).

The conduct of the petitioner—his effort, through intimidation by threats of violence, to compel disclosure of information which Friedlander had a legal right to withhold—clearly constituted the crime of coercion and fully justified the judgment of conviction. [See *People* v. *Berman* (1934) 264 N. Y. 693, aff'g (1st Dept. 1934) 241 App. Div. 844.]

A. There was no dismissal of the count charging coercion.

Claim is made that the charge of coercion was dismissed because the petitioner's attorney was prevented from discussing that crime in his opening statement.

In opening to the jury counsel must confine themselves to the facts which they expect to prove, and it is the court's duty to keep them within that limit. [See *People* v. *Wolf* (1906) 183 N. Y. 464, 472-473.]

The petitioner's attorney, however, seemed intent upon treating matters foreign to the issues and the court was compelled upon several occasions to admonish him in that regard (see, *e. g.*, 115, 118). In the particular instance now singled out by the petitioner (Petitioner's Brief, pp. 5, 21), the defense attorney, after explaining that it was Schneider's duty "to take charge of the various activities of the union," had begun to elaborate by stating, "Mostly during the times when there are no strikes it is usual all the time—" (120). The court thereupon told counsel (120):

> "That would not be relevant in this case. Confine yourself to the counts of conspiracy and assault."

This was no direction that counsel refrain from discussing the charge of coercion. True, the word "coercion" itself was not used, but the context indicates that

the court was merely seeking to restrain the attorney from going beyond the issues presented by the indictment. A similar direction had previously been given, though on that occasion, the court requested defense counsel to "tell the Jury about the assault" (118). There was no need to refer to each of the charges being tried. The court simply selected a shorthand method of instructing counsel to keep within the bounds of relevancy.

Quite apart from that, however, it is patent that the defendant was not prevented from opening upon the charge of coercion. The defense to both was an alibi, that the petitioner was not at the scene of the crime, and counsel discoursed on that matter without interruption (131-3).

In addition, defense counsel affirmatively recognized, throughout the trial, that the coercion charge was still in the case and was being pressed. Thus, at the close of the People's case, he moved to dismiss "on the ground that no prima facie case had been made out by the People, as to the various charges of conspiracy, **coercion** and assault, as contained in this indictment" (758), and he repeated this motion at the end of the entire case (3526).

Moreover, the attorneys for both sides referred to the charge of coercion in their respective summations (3531, 3711, 3821, 3832-3). Thus, defense counsel told the jury (3531):

> "We have an indictment against six defendants. *They are charged with coercion, coercion exercised upon one Jacob Friedlander* to compel him to do something that he had a right to refrain from doing."

Finally, the court thoroughly covered the subject in its charge; it read section 530 of the Penal Law to the jury and told them that they could return a verdict "as to coercion" in any one of three different ways (3741-2, 3866, 3871-2).

In short, the court did not rule that the coercion charge was out of the case, nor did defense counsel conclude that such was the fact.

B. The petitioner's guilt of coercion did not depend upon the commission of an assault either by himself or by his codefendants.

The crime of coercion does not require the commission of an assault. Under the statute (Penal Law, § 530), one is guilty of coercion who "threatens * * * violence * * * or uses or attempts intimidation * * * by threats," for the purpose of compelling the victim to do an act which he has the right to abstain from doing. There is no necessity either that the victim do the act in question or that the defendant carry out his threat by actual use of force. [See *People* v. *Berman* (1934) 264 N. Y. 693, aff'g (1st Dept. 1934) 241 App. Div. 844.] In the *Berman* case, a delegate to the Retail Clothing Salesmen Union was tried for, and convicted of, coercion. The evidence disclosed that, upon being informed by a non-striking union member that he was "through with the Union," the defendant replied (p. 693):

> "If you feel that way, don't forget a sign is bound to fall on you, you are bound to get cut up, or probably a truck is going to run over you. Don't blame us, don't blame the union, that will be the workings of your own boss * * *."

None of those things happened, and yet the Court of Appeals upheld the judgment of conviction.

Nor is there anything in the facts herein which requires that the petitioner's guilt of coercion be predicated upon the commission of an assault either by himself or by someone else. On the contrary, his threatening attitude and conduct toward Friedlander when the two of them were alone in Schneider's office, presented in and by itself alone every element necessary to constitute the crime.

Consequently, the fact that all six defendants, including the petitioner, were acquitted of assault is without bearing or effect upon Schneider's guilt of coercion.

In passing and although not strictly germane to the issues, it should be noted that the jury's verdict was inconsistent neither in fact nor in law. In convicting the petitioner and acquitting the others, the jury were but giving concrete effect to the relative weight of the evidence against each of the defendants, for while Friedlander's account of the petitioner's criminal conduct was strongly substantiated by the testimony of the witness Fitz and by the proven falsity of Schneider's alibi, the evidence which he gave against the others stood more or less by itself and was opposed by less demonstrably false defenses. Indeed, the acquittals may well have been the result of a reasonable doubt as to the identities of the petitioner's associates in the threatening and beating of Friedlander. But even if the verdict be regarded as illogical, that fact would not affect the result. [See *People* v. *Cohen* (1918) 223 N. Y. 406, cert. den. 248 U. S. 571; *People* v. *Eichner* (1st Dept. 1915) 168 App. Div. 200; *Sasser* v. *United States* (C. C. A. 5th Cir. 1928) 29 Fed. (2d) 76, 78, cert. den. *sub nom. Russell* v. *United States,* 279 U. S. 836.]

Similarly, since the petitioner's guilt of assault could be predicated only upon a finding that he had induced the others to attack Friedlander, his acquittal of the conspiracy and assault charges may merely have indicated that the jury were not convinced that he had given orders for an actual beating. [See *People* v. *Haupt* (1928) 247 N. Y. 369, 371; *Dunn* v. *United States* (1931) 284 U. S. 390, 394.]

C. The petitioner's conviction was based upon the acts charged in the indictment.

The meeting between Friedlander and the petitioner took place on April 8, 1938. However, evidence that Friedlander had been followed by union representatives on April 6, two days before, was introduced by the People

to support the charge of conspiracy; indeed, the very fact that Friedlander was so "followed and trailed" is set forth in the indictment as one of the overt acts committed in furtherance of the conspiracy (12). Nothing in the record affords even the slightest basis for the supposition that the petitioner's conviction was sought, and his guilt predicated, upon the events of April 6 rather than upon his own conduct on April 8.

II

The trial was fair; petitioner's constitutional rights were not invaded.

It is contended that the trial court suspended the constitutional guarantees applicable to criminal cases and thereby permitted the jury to convict the petitioner of coercion because of his religion and of his radical views and affiliations in social and political fields (see Petitioner's Brief, pp. 18 *et seq.*). Significantly, no objection upon constitutional grounds was interposed at the trial to any of the items now urged as being violative of the due process and equal protection of the laws clauses of the Federal Constitution, and, with but one exception, none of those items was so attacked in the Court of Appeals.

A. There was no attack upon the petitioner's religious, social, or political views.

The claim is made that the petitioner was "singled out for attack by virtue of the fact that he was a Jew, an alien, and particularly for his alleged radical political and social views and connections * * *" (Petition, p. 7).

There is nothing in the record to indicate what Schneider's religion was—other than a gratuitous remark interjected by his own counsel at the trial (2665). But, even if he be a Jew, it is clear that he was not prejudiced thereby

on the trial. Three of his codefendants who were acquitted were likewise Jewish (Rau, Gru, Lauber), and the jury disagreed as to a fourth Jew, Mencher. More than that, the petitioner himself was acquitted of assault, a felony. and convicted only of coercion, a misdemeanor. Friedlander and most of the principal witnesses for the People (Schwartz, Streit, Fitz, Kolvek) were Jewish, as were several of the jurors (*cf.* 53-4). Furthermore, at the time the application for a stay of execution was being argued before Mr. Justice STONE, *defense counsel expressly repudiated the claim that the petitioner's religion had militated against him in any way.*

The record does not disclose the nature of the petitioner's views upon political or social subjects, or even, as the petitioner recites (Petition, p. 2), that he was a member of the American Labor Party. It does appear that he was an alien, but it cannot be said that that prejudiced him, since the jury acquitted his codefendant, Gru, who also was an alien (2464).

1. The court's charge, to which no objection was taken, was proper.

The court instructed the jury that the union "is not on trial" and that (3866)

> "a man has a right to belong to any party or church that he may select, or any union."

The trial judge then told them that their verdict was to be based upon the law, saying (3866-7):

> "That is the law of assault, the law of conspiracy and the law of coercion, and I certainly think that you ladies and gentlemen in your deliberations will not inquire in this case and on the evidence you have heard, as to the political, social or religious affiliations of a man in connection with this case, except in so far as these inquiries may help you to determine where the truth lies."

The instruction, it seems to us, was intended for the benefit of petitioner and his codefendants. Defense counsel, in his summation, had mentioned "prejudices [and] personalities" (3702), which might have a tendency to react upon his clients, and the court was desirous that they should play no part in the case. Though the judge might have phrased the thought more clearly, his purpose was to make certain that the jurors would not permit any extraneous considerations to predispose them against any of the defendants. The statement that there were to be no inquiries into the affiliations of anyone "except in so far as these inquiries may help you to determine where the truth lies" (3867), manifestly, was not a direction that the jury consider that subject; rather, it was an admonition that the views of witnesses, as disclosed by their examination, should be weighed only in so far as was necessary for the jurors to determine whether self-interest or bias for the defense may have colored the testimony of those witnesses.

In any event, though, *no objection or exception was taken to the charge;* more, although four of the defendants were of the same race and religion as the petitioner, and although all were, for all that appears, possessed of the same social and political affiliations, the jury acquitted them of all of the charges and the petitioner of two of them.

B. The defense witness Quill was not "tried and convicted of radicalism."

The petitioner states that his witness Michael Quill, as well as he, was "tried and convicted of radicalism" (Petitioner's Brief, p. 8).

Quill, the petitioner's chief alibi witness, was properly cross-examined concerning his union affiliations (797-8), in order to establish his bias for the petitioner Schneider as a fellow member of the C.I.O. (795-6).

Questions as to whether or not he had used, or had advocated the use of, force or violence in strikes (830-2, 834-5, 839) were permissible as testing his credibility. [See *People* v. *Malkin* (1928) 250 N. Y. 185, 193; *People* v. *Johnston* (1920) 228 N. Y. 332, 340.] In addition, all of the questions were answered in the negative so that, even if deemed improper, they cannot be regarded as prejudicial. [See *People* v. *Mullen* (1900) 163 N. Y. 312 319; *People* v. *Irving* (1884) 95 N. Y. 541, 543.]

III

No federal question is presented to this Court.

Examination of the petitioner's claims, on the merits, has revealed their lack of substance. Conduct of court and prosecution was proper, and the petitioner was not deprived of his constitutional rights to due process or to the equal protection of the laws. He was convicted of that crime of coercion which was set forth in the indictment and for which he had been tried. Neither he nor any of his witnesses were subjected to attack for their religious, social, or political beliefs or affiliations.

Moreover, considering the case upon purely procedural grounds, no federal question is presented to this Court.

At the trial, the petitioner made no objection, either directly or by inference, that he had in any way been denied the full benefit of his constitutional rights.

Similarly before the Court of Appeals, although numerous assignments of error were urged (Petitioner's Court of Appeals Brief, Point VI, pp. 63-66; Point VII, pp. 67-73; Point VIII, pp. 74-78; Point X, pp. 81-114), the petitioner did not pretend that any of them, save one, involved a federal question. In that one instance, he claimed a denial of due process upon the limited and specific ground that the trial judge, in his charge, had committed prejudicial error by appealing to the racial, social,

and political prejudices of the jury (Petitioner's Court of Appeals Brief, Point IX, pp. 78-81). The point was without merit (see, *supra*, pp. 9-10); in addition, it appeared that it could not be considered by the Court of Appeals because it had not been raised upon the trial below. [Respondent's Court of Appeals Brief, Point VII E, pp. 61-63; *People* v. *Sieke* (1918) 222 N. Y. 611; *People* v. *Sherlock* (1901) 166 N. Y. 180, 183.] [2]

On January 9, 1941, the petitioner applied to Mr. Justice STONE for a stay of execution and, in his argument, petitioner's counsel once more relied solely upon the alleged error in the trial court's charge.

Thereafter, the petitioner moved in the Court of Appeals for an amendment of the remittitur so as to have it recite that the Court had "overruled the **contentions** of the appellant" that the trial was conducted in violation of the due process clause and the equal protection of the laws clause of the Fourteenth Amendment, and had "held that his trial and conviction were in conformity with the federal Constitution" and that "the trial including the charge of the trial judge" did not violate any constitutional provision (Petitioner's Notice of Motion to Amend Remittitur, p. 1).

By order dated January 24, 1941, the Court of Appeals amended its remittitur, but with a significant divergence from the wording proposed by the petitioner. Instead of reciting that the Court had "overruled the **contentions** of

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[2] The suggestion that the dissent—placed upon the ground "that there were errors committed at the trial which in their [the two judges'] opinion were clearly prejudicial"—amounted to "a statement that *petitioner did not have a fair trial*" (Petitioner's Brief, p. 24), is without the slightest basis. In the Court of Appeals, the petitioner had relied upon a large number of alleged errors arising out of the reception and exclusion of evidence, the district attorney's summation and conduct, the judge's charge, and like matters. Consequently, it seems evident that the two dissenting judges had in mind one or more of those items, rather than any alleged deprivation of due process or other violation of constitutional right.

the appellant''—as requested in the petitioner's moving papers—the order stated that the Court had ''overruled the **contention** of the appellant that his trial and conviction'' were violative of the constitutional rights of due process and of the equal protection of the laws and had **''refused to pass upon the effect of any parts of the charge to which no exceptions were taken.''**

That order clearly establishes that the Court of Appeals had not passed upon the point—now raised for the first time—that the conduct of the trial as a whole was violative of due process. Moreover, when considered in the light of the question actually presented to that Court, the order affirmatively shows that the Court had refused to pass upon the sole constitutional issue advanced before it by the petitioner, namely, the propriety of an excerpt from the charge (see, *supra*, pp. 9-10; Petitioner's Court of Appeals Brief, Point IX, pp. 78-81). True enough, another part of his brief (Point X, pp. 81-114) dealt with the alleged unfairness of the trial, but not even the slightest suggestion was made that due process clause or the equal protection of the laws clause had been violated thereby, and—unlike the constitutional argument contained in Point IX (Petitioner's Court of Appeals Brief, pp. 80-81)—the only cases cited and relied upon represented decisions of state courts (Petitioner's Court of Appeals Brief, p. 114).

In short, therefore, since no federal question whatever was raised at the trial, and since the Court of Appeals refused to pass upon the sole federal question urged before it, this Court will not assume jurisdiction. [See *Herndon* v. *Georgia* (1934) 295 U. S. 441; *Chicago, &c. Ry. Co.* v. *McGuire* (1904) 196 U. S. 128, 131-132; *Mutual Life Ins. Co.* v. *McGrew* (1903) 188 U. S. 291; *Capital City Dairy Co.* v. *Ohio* (1901) 183 U. S. 238, 248; see, also, *Lynch* v. *New York* (1934) 293 U. S. 52, 54-55.]

Nor does there remain any other ground upon which to base jurisdiction. This Court has consistently rejected the proposition that it may consider the entire record

in determining whether a fair trial was had, where appropriate objection or exception has not been made at the trial. Thus, in *Whitney* v. *California* (1926) 274 U. S. 357, Mr. Justice SANFORD wrote (pp. 362-363):

> "We proceed to the determination, upon the merits, of the constitutional question considered and passed upon by the Court of Appeal. Of course our review is to be confined to that question, since it does not appear, either from the order of the Court of Appeal or from the record otherwise, that any other federal question was presented in and either expressly or necessarily decided by that court. [Cases cited.] It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a federal nature. *Dewey* v. *Des Moines, supra,* 199; *Keokuk & Hamilton Bridge Co.* v. *Illinois, supra,* 634. And this necessarily excludes from our consideration a question sought to be raised for the first time by the assignments of error here—not presented in or passed upon by the Court of Appeal—whether apart from the constitutionality of the Syndicalism Act, the judgment of the Superior Court, by reason of the rulings of that court on questions of pleading, evidence and the like, operated as a denial to the defendant of due process of law. [Cases cited.]"

IV

The petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS E. DEWEY
District Attorney
New York County

STANLEY H. FULD
Assistant District Attorney
Of Counsel.

March, 1941.